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KSM Industries Incorporated and United Paperworkers International Union, Local 7779, AFL-CIO, CLC. Cases 30-CA-13762, 30-CA-14008, and 30-CA-14101

August 1, 2002

**ORDER GRANTING MOTION FOR
RECONSIDERATION**

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN,
COWEN, AND BARTLETT

On September 28, 2001, the National Labor Relations Board issued a Decision and Order¹ in this proceeding finding, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act, by unilaterally implementing its health insurance proposal, after reaching impasse. In finding this violation, the Board relied on *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997).

On October 19, 2001, the Respondent filed a Motion for Reconsideration, asserting that, with respect to the unilateral implementation of the medical and dental insurance proposal, the Board made “*de novo* findings and/or conclusions with regard to material facts” that are “erroneous as either unsupported by any record evidence or contrary thereto.” The General Counsel filed an opposition to the motion.

We grant the motion only insofar as we shall delete the last two sentences of the penultimate paragraph of the decision.²

In all other respects, the Board denies the motion as lacking merit. Section 102.48(d)(1) of the Board’s Rules and Regulations permits a party in “extraordinary circumstances” to move for reconsideration, rehearing, or reopening of the record after a Board decision or Order issues. There are no such extraordinary circumstances here. In this regard, we note that the Respondent, in its Motion for Reconsideration, does not attack the validity of *McClatchy Newspapers*, supra, or its application to the instant case. Indeed, the Respondent does not even seek

¹ 336 NLRB No. 7.

² Chairman Hurtgen and Member Bartlett agree that the deleted sentences refer to “material facts” within the meaning of Sec. 102.48(d)(1), in the sense that these facts are relevant to the case. However, for the reasons indicated herein, we do not consider the matter to be so “extraordinary” as to warrant a reconsideration of the ultimate result. Member Liebman, the sole Member of the current Board who did participate in the underlying case, joins her colleagues in granting the motion. She also disagrees with her dissenting colleague for the reasons described in her concurring opinion.

reversal of the Board’s conclusions of law in the instant case. Also, most assuredly, the Respondent does not make the argument that is made by our dissenting colleague. In these circumstances, we find that there are no “extraordinary circumstances” to warrant reversal of the conclusions of law or adoption of the argument of the dissent.³

Accordingly, the Board having duly considered the matter,

IT IS ORDERED that the Respondent’s motion is granted, as described above.

Dated, Washington, D.C. August 1, 2002

Peter J. Hurtgen, Chairman

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

Because of changes in the Board’s composition, this case places us in an awkward position. The result is a somewhat unusual disposition of the Respondent’s motion for reconsideration, which leaves the Board’s original decision unaffected in any significant way—and still correct in finding a violation of Section 8(a)(5). I join in the Board’s ruling. I write separately (1) to emphasize my own view that the sentences deleted from the Board’s decision are not necessary to its rationale, and (2) to disagree with Member Cowen’s view that there was no violation of Section 8(a)(5) here.

Of the three Board Members on the original panel (Member Truesdale, Member Walsh, and myself) that decided this case on September 28, 2001, only I remain on the Board to join in ruling on the Respondent’s motion for reconsideration of the panel’s decision. Two of my colleagues, Chairman Hurtgen and Member Bartlett, who are new to the case and in one instance new to the Board,¹ have acted on the motion, but have expressed no views regarding the Board’s decision. This is the course I would follow, were I placed in their position. In the interests of finality and administrative economy, motions for reconsideration are disfavored. Those interests strike me as especially strong when the composition of the

³ Chairman Hurtgen and Member Bartlett did not participate in the underlying case and they express no views regarding the Board’s decision.

¹ Member Bartlett, as well as Member Cowen, received a recess appointment to the Board on January 22, 2002.

Board has changed substantially in between the time a decision is issued and the time a motion for reconsideration is made. Indeed, reconsidering cases in these circumstances may even invite motions for reconsideration, if losing parties believe that new Board Members may be more sympathetic to their positions. Accord *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1236, 1239 (1954) (Board will not entertain motion for reconsideration based solely on change in Board membership).

Member Cowen has nonetheless chosen to revisit the merits of the Board's original decision, and that is his prerogative. In his view, "absent a finding that the Respondent's April 11 letter to the Union presented the changes as a *fait accompli*, there is no violation of Section 8(a)(5)." A sentence describing the Respondent's actions of April 11 as a "*fait accompli*" has now been deleted from the Board's decision, though the Board's Order does *not* describe the sentence as "materially erroneous" (as Member Cowen suggests).² That deletion is immaterial because there is no basis here for concluding, as Member Cowen does, that the Union waived its right to bargain. The Respondent has never argued as much. Nor do the facts support such an argument.

The Board has determined that "the Respondent announced its intention to implement, and in fact did implement, the [medical and dental insurance] proposal." 336 NLRB No. 7, slip op. at 3. Based on the *McClatchy Newspapers* decision,³ the Board has also determined that this proposal could not be lawfully implemented, even following a lawful impasse, because the proposal gave the Respondent so much discretion that it "nullified the Union's authority to bargain over the terms of a key term and condition of employment." *Id.* (footnote omitted). The violation of Section 8(a)(5) here follows directly from the nature of the Respondent's proposal and its implementation.

Member Cowen regards the Respondent's April 11 letter, transmitting a list of changes in health insurance benefits in line with the proposal, as if it were the proposal itself, to which the Union was obliged to respond (or, by failing to respond, waive its right to bargain). But the Union already *had* bargained, to impasse, over the proposal, which the Respondent then proceeded to implement, according to its terms. The April 11 letter was itself part of the implementation of the proposal, not a step preliminary to implementation (as Member Cowen treats it).

² A second sentence ("The Respondent admittedly did not even discuss these matters with the Union beforehand.") has also been deleted, but Member Cowen does not argue that this specific deletion matters.

³ *McClatchy Newspapers*, 321 NLRB 1386 (1996), enf'd. 131 F.3d 1026 (D.C. Cir. 1997).

As the Board's decision (still) observes, the proposal called for "discussions" with the Union over insurance matters, but the testimony of the Respondent's own official established that, by this, the Respondent did *not* contemplate actual bargaining. Under these circumstances, the Respondent's invitation "to discuss this matter" clearly was not a new invitation to bargain, and it triggered no duty to respond on the Union's part. The Board has found no waiver in analogous situations where a meaningful union role in bargaining was foreclosed.⁴ None of the cases cited by Member Cowen, meanwhile, involve the implementation of a *McClatchy Newspapers* type proposal, following an impasse in bargaining. In its current form, then, the Board's decision amply sets out a basis for finding a violation of Section 8(a)(5), consistent with *McClatchy Newspapers*, as extended to a health insurance proposal.⁵

Dated, Washington, D.C. August 1, 2002

Wilma B. Liebman,

Member

NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

Contrary to my colleagues, who grant the Respondent's Motion for Reconsideration for the limited purpose of deleting two materially erroneous sentences from the Board's decision in *KSM Industries*, 336 NLRB No. 7 (2001), I would grant the Respondent's motion *and* reverse the Board's finding in that decision that the Respondent's unilateral implementation of its medical/dental proposal ("health insurance proposal") violated Section 8(a)(5) of the Act. *KSM Industries*, *supra*, slip op. at 2-3.

In *KSM Industries*, *supra*, the Board found, *inter alia*, that the parties bargained to impasse over the Respondent's health insurance proposal.¹ The legality of the

⁴ See, e.g., *Pontiac Osteopathic Hospital*, 336 NLRB No. 101, slip op. at 3 (2001) (employer's letter of intent to unilaterally implement wage and benefit revisions simply informed the union about decision); *Defiance Hospital*, 330 NLRB 492, 493 (2000) (employer's letter announced decision to make future changes and invited union representatives to contact employer within 7 days, if they had objections or questions); *Keystone Consolidated Industries*, 309 NLRB 294, 297 (1992) (employer had taken position that unilateral change in pension plan administration was not mandatory subject of bargaining), enf. denied on other grounds 41 F.3d 746 (D.C. Cir. 1994).

⁵ Member Cowen has chosen not to address this aspect of the Board's decision.

¹ The proposal, which was a component of the Respondent's Welfare Benefits proposal, states, in relevant part:

impasse, which the Respondent declared in its implementation/impasse letter of March 17, 1997,² was not in dispute. Notwithstanding this lawful impasse, the Board, relying on *McClatchy Newspapers*, 321 NLRB 1386 (1996), enf.d. 131 F.3d 1026 (D.C. Cir. 1997), found the Respondent's implementation of its health insurance proposal to be unlawful.³

On October 19, 2001, the Respondent filed a Motion for Reconsideration.⁴ In its motion, which raises issues relating to the above-mentioned finding that the Respondent violated Section 8(a)(5) by unilaterally implementing its health insurance proposal, the Respondent asserts

Section 3. Medical/Hospital and Dental

- (A) Eligible regular full-time employees are eligible for the medical/hospital and the dental benefits provided by the Company.
- (B) During the term of this Agreement, the Company and the employee will share in paying for the entire cost of the medical/hospital and the dental benefits on a contribution ratio of eighty (80%) percent for the Company and twenty (20%) percent for the employee. Provided, the employee will not pay more than the following amounts for the applicable category during the term of this Agreement:
 - Single — \$40 per month.
 - Limited — \$80 per month.
 - Family — \$130 per month.

If the Company provides these benefits on a self-funding basis, then the cost is computed from the COBRA rates provided by the Plan Administrator.

- (C) During the months of April, 1997 the employees will be provided an "open enrollment" period for the medical/hospital and the dental benefits. . . .
- (D) During the term of this Agreement and for cost containment purposes, the Company may change the method and/or means for providing for the medical/hospital and the dental benefits, which includes, the plan design, the level of the benefits and the administration thereof; provided, the change is applied on a Company-wide basis, the change is first discussed with the Union, and any deductibles and coinsurance limits for the medical/hospital benefit will not exceed [certain specified amounts].

The Board found that this proposal (specifically, the language in sec. 3(D)), was "akin" to the merit wage proposal in *McClatchy Newspapers*, supra, and was, therefore, unlawful. *KSM Industries*, supra, slip op. at 3.

² All dates refer to 1997 unless otherwise indicated.

³ In light of my rationale for reversing this violation, as discussed below, I find it unnecessary to address the Board's application of *McClatchy Newspapers*, supra, to the Respondent's health insurance proposal in *KSM Industries*, supra, or the validity of *McClatchy Newspapers*.

⁴ Sec. 102.48(d)(1) of the Board's Rules and Regulations states, inter alia:

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on.

that, "[I]n the section of [*KSM Industries*, supra] entitled, 'Unilateral Implementation of Health Insurance Proposal,' the Board made . . . *de novo* findings and/or conclusions with regard to material facts. . . . These findings are materially erroneous as either unsupported by any record evidence or contrary thereto." Specifically, the Respondent contends that the following findings in *KSM Industries*, supra, slip op. at 3, are "materially erroneous as either unsupported by any record evidence or contrary thereto":

1. "Indeed, on April 11, when the Respondent transmitted a list of changes in health insurance benefits to the Union, including increases in deductibles and out-of-pocket expenses, the changes were presented as a *fait accompli*."
2. "The Respondent admittedly did not even discuss these matters with the Union beforehand."

By granting the Respondent's motion, my colleagues agree that these findings were materially erroneous, i.e., they were either unsupported by the record or contrary to the record. However, based on their view that the Respondent's motion did not request—or does not invite—any changes to the Board's conclusions of law or its Order, they refuse to reconsider the merits of the Board's finding that the Respondent violated Section 8(a)(5) by unilaterally implementing its health insurance proposal. Thus, they simply delete the offending sentences without disturbing that ultimate finding.⁵

I join my colleagues in deleting the above-quoted sentences from *KSM Industries*, supra. But, unlike my colleagues, I believe that the Respondent's motion can reasonably be read as giving the Board grounds for reconsidering the merits of the finding that the Respondent

⁵ Member Liebman invokes "the interests of finality and administrative economy" as reasons for not reconsidering the merits of the 8(a)(5) allegation at issue. I agree that those considerations are especially important in the context of deciding motions for reconsideration. However, in my view, the greater benefit of rectifying an erroneous finding of a violation outweighs those considerations in these circumstances.

Member Liebman cites *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1236, 1239 (1954), for the proposition that the "Board will not entertain [a] motion for reconsideration based solely on change in Board membership." Member Liebman fails to note, however, that the instant motion for reconsideration is not based upon any change in the Board. Rather, the motion is based upon a material factual error in the Board's original decision in this matter, an error which the Board is not correcting notwithstanding the recent change in Board configuration. I differ from my colleagues in that I would also correct the erroneous finding of a violation which flowed from this material factual error. Simply stated, *Wagner Iron Works* does not hold that a reconfigured Board may not reconsider an erroneous finding of a violation; it only holds that a change in Board membership should not be the basis for granting a motion for reconsideration.

violated Section 8(a)(5) by unilaterally implementing its health insurance proposal. In its motion, the Respondent requested the Board to reconsider the above-quoted findings of fact, “and to issue an Order either expunging the findings of fact or correcting the same to properly reflect the record evidence.” Unlike my colleagues, who read the removed language as if it exists in a vacuum, sealed off from its effect on the validity of the 8(a)(5) violation, I see the removed language as bound up with, and central to, this violation. In my view, the removed language cannot be separated from the violation itself; that is, as I explain below, if the Respondent did not present the changes in the health insurance plan to the Union as a *fait accompli* (and my colleagues, in granting the Respondent’s Motion, concede that it did not), a finding that the Respondent violated Section 8(a)(5) by unilaterally implementing the health insurance plan cannot follow under applicable Board law. A material error of this sort—i.e., the type of error that, if corrected, would eliminate an essential factual foundation supporting a violation—raises the sort of “extraordinary circumstance” necessary to reconsider the merits of that violation under Section 102.48(d)(1) of the Board’s Rules and Regulations. In sum, the merits of this 8(a)(5) violation are properly before the Board for reconsideration.⁶

The relevant facts regarding the Board’s finding that the Respondent violated Section 8(a)(5) by unilaterally implementing its health insurance proposal are these. On April 11, the Respondent sent a letter to the Union notifying it of changes to the Respondent’s health insurance plan that were to be retroactive to April 1. The cover letter, which was signed by Administrative Manager David Oechsner, stated:

Enclosed is information relative to the medical and dental plan and changes that are to be retroactive to April 1, 1997. This information will be mailed by the end of next week to all KSM employees who are currently participating in the KSM health and dental benefit program.

⁶ Member Liebman contends that the Board’s Order does not describe the above-quoted “*fait accompli*” sentence as materially erroneous, and that the deletion of that sentence is, in any event, “immaterial.” I fail to see how this can be so, especially in light of the fact that my colleagues have *granted* the Respondent’s motion (albeit for a limited purpose).

As I have stated above, a finding that the Respondent presented the proposal as a “*fait accompli*” is, in my view, an essential ingredient of this 8(a)(5) violation. Furthermore, the Respondent’s motion requests the Board to delete two “materially erroneous” findings. Also, Sec. 102.48(d)(1) of the Board’s Rules and Regulations refers to “material error[s] and “material fact[s].” By granting the motion, my colleagues have implicitly found that the deleted findings are, indeed, “material.”

Please contact me if you wish to discuss this matter.

The letter contained attachments (which were to be mailed by the end of the next week) advising employees “of changes that have been made to [the Respondent’s] Health and Dental Benefit Package [e]ffective April 1, 1997.”

In adopting the judge’s finding that the Respondent violated Section 8(a)(5) by implementing these changes on April 11 (retroactive to April 1), the Board stated, *inter alia*, that the above-quoted letter to the Union presented the changes to the health insurance plan “as a *fait accompli*.” *KSM Industries*, *supra*, slip op. at 3. As stated above, in granting the Respondent’s motion, my colleagues have deleted, *inter alia*, this finding.

In my view, absent a finding that the Respondent’s April 11 letter to the Union presented the changes as a *fait accompli*, there is no violation of Section 8(a)(5) here. “It is settled Board law that ‘[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.’” *Haddon Craftsmen*, 300 NLRB 789, 790 (1990), *rev. denied* mem. sub nom. *Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991) (citations omitted). In this regard, “a union which receives timely notice [of a proposed change to terms and conditions of employment] must take advantage of that notice if it is to preserve its bargaining rights. . . . Such a failure of prosecution constitutes a waiver of a union’s right to bargain.” *Medicenter, Mid-South Hospital*, 221 NLRB 670, 679 (1975).

Further,

it is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it. In short, when a union receives notice that a change in terms and conditions of employment is contemplated, it must fulfill its obligation to request bargaining over the change or risk a finding that it has lost its right to bargain through inaction and, as a consequence, risk the dismissal of 8(a)(5) allegations because no objective basis exists to find or infer bad faith on the part of the employer.

Haddon Craftsmen, *supra* at 790–791 (citations omitted). The Board has held that as little as 2 days’ notice to a union may fulfill an employer’s bargaining obligation. *Shell Oil Co.*, 149 NLRB 305 (1964). See also *Clarkwood Corp.*, 233 NLRB 1172 (1977), *enfd. mem.* 586 F.2d 835 (3d Cir. 1978) (5 days’ notice sufficient); and *Haddon Craftsmen*, *supra* (5 days’ notice sufficient).

The Respondent did not present its changes to the health insurance plan as a *fait accompli* in its April 11 letter. First, the letter explicitly invited the Union to contact Oechsner “to discuss this matter.” This demonstrates that the letter constituted an announcement of *proposed* changes that were still open to negotiation. And, second, the record reflects that the Respondent apparently did not actually implement these changes until May 1, approximately 3 weeks later. This intervening period between the date of the letter and the date of the actual implementation of the changes presented the Union with ample time to request the Respondent to negotiate about the changes. The Union’s failure to do so constituted a waiver of its right to bargain about these changes.⁷ Accordingly, I would reverse the finding in

⁷ The three cases which Member Liebman contends are “analogous” to the instant 8(a)(5) violation are, in fact, readily distinguishable.

First, in *Defiance Hospital*, 330 NLRB 492, 493 (2000), the Board found that the employer presented the unions with a “*fait accompli*” wage increase implementation based on, *inter alia*, the fact that, “although [the employer’s] letter to the Unions purported to give them 7 days to respond . . . there was no meaningful opportunity for bargaining because [the employer] *simultaneously* issued a letter to employees announcing a wage increase.” *Id.* (Emphasis added.) In the instant case, however, the Respondent’s letter to the Union stated that the information regarding the changes to the health insurance plan “will be mailed by the end of next week to all KSM employees who are currently participating in the KSM health and dental benefit program.” Thus, there was no simultaneous transmission of correspondence; and, in light of the fact that the Respondent apparently did not implement the changes until May 1 (approximately 3 weeks after the letter was sent to the Union), the Union had sufficient time to request bargaining.

Second, in *Pontiac Osteopathic Hospital*, 336 NLRB No. 101, slip op. at 3 (2001), the Board majority adopted, *inter alia*, the judge’s finding that, although the union made a timely request to bargain with the employer about the employer’s paid time off (PTO) policy proposal, the employer ignored its request. Here, of course, the Union did *not* request the Respondent to bargain about the proposed April 11 changes to the health insurance plan. Although the judge in *Pontiac Osteopathic Hospital* found it unnecessary to pass on the contention that the employer presented its proposed change regarding the PTO policy to the union as a “*fait accompli*,” the Board nonetheless chose to address that issue. *Id.* It found that the employer presented its PTO proposal to the union as “a decision that it had already implemented.” *Id.* Here, however, the Respondent, in its letter to the Union, expressly invited the Union to “discuss” the changes. And, as stated above, there was, apparently, a 3-week period between the Respondent’s letter and the date on which it implemented the changes. In short, the “unequivocal language” that the employer in *Pontiac Osteopathic Hospital* used regarding its implementation is lacking here. *Id.* Thus, the Respondent’s conduct cannot reasonably be likened to the employer’s conduct in *Pontiac Osteopathic Hospital*.

Finally, in *Keystone Consolidated Industries*, 309 NLRB 294 (1992), *revd.* and *remanded* 41 F.3d 746 (D.C. Cir. 1994), the Board found, *inter alia*, that the employer presented the union with “*fait accompli*” changes to a pension plan. In reaching this conclusion, the Board relied on, first, the fact that the employer “consistently” maintained that any change in administration of the pension plan was not subject to mandatory bargaining; and, second, the fact that the employer was not “amenable” to bargaining about the change with the

KSM Industries, *supra*, that the Respondent violated Section 8(a)(5) by unilaterally implementing its health insurance proposal.

Dated, Washington, D.C. August 1, 2002

William B. Cowen,

Member

NATIONAL LABOR RELATIONS BOARD

union. *Id.* at 297. Here, the evidence does not show that the Respondent would not have been amenable to bargaining. In this regard, the Respondent did not contend that the health insurance plan was not a mandatory subject of bargaining. And, as stated above, its letter to the Union presented the Union with adequate time to request bargaining.

